

# Christmas Showdown in Poland

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Maximilian Steinbeis Sa 3 Dez 2016

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Dear Friends of Verfassungsblog,

something decidedly un-christmasy is going on right now in Poland. On Thursday, I have talked to a person close to the ongoing conflict about the Polish Constitutional Tribunal on the phone, and here is what I have learnt:

1. The PiS government is repeating all the dirty legislative tricks they were playing to the Tribunal as whole, to make sure they get to install a President to their liking.
2. Before this year ends, there might be de facto two Constitutional Tribunals in Poland,
3. with two acting interim Presidents,
4. possibly each of them issuing divergent judgments.

Now, before I go on: journalistic accurateness would require that I find second sources to verify all these informations, which I haven't yet, but as I consider the person 100% trustworthy I thought I'd rather make transparent that this letter doesn't meet strict standards and share what I heard. Should I have committed any errors of fact or judgment or omissions please feel free to comment or reply.

The whole background story how things went that bad can be found [here](#).

## The Fight over the President's Office

On December 19th, the term of office of the incumbent President of the Polish Constitutional Tribunal Andrzej Rzepliński will end. For more than a year now, Rzepliński had been fighting tooth and nail against the attempt of PiS to get the Tribunal under their control. Most of all, he hasn't permitted the three so-called „anti-judges“ – elected by the PiS majority on seats already occupied by judges elected by the former majority but not sworn in by the President Andrzej Duda – to take up their office. Should his successor reverse this decision, the number of PiS-appointed judges would rise to seven out of fifteen.

The PiS legislators had changed the procedure to appoint Rzepliński's successor to their favour, and on November 7th, surprisingly to some, the Constitutional Tribunal [declared these changes constitutional](#) – but with an important caveat: The changed rules, in order to be constitutional, have to be understood in a particular way which would make it unlikely that one of the PiS-appointed judges in the minority makes it on the list of candidates for President Duda to choose from.

The PiS legislators, in their turn, will not just sit by and do nothing as December 19th draws close. They have already prepared a new set of legislative changes designed to thwart the chances of the Rzepliński camp in the Tribunal to hold on to control. These draft laws do not provide for a *vacatio legis*, once adopted they enter into force immediately. The PiS majority in Parliament can enact them right before December 19th, so it will be very hard to bring a motion of unconstitutionality before the Constitutional Tribunal. Additionally, they have split this regulation into three different laws, all of which can be changed until the very last minute. Good luck trying to prepare a complaint against that.

One of the provisions in these drafts would let President Duda appoint an interim sort-of President-Commissioner to fulfil the obligations of the President of the Tribunal until a successor is found. The requirements of this office seem to be tailored to the one judge the PiS apparently wants to take over from Rzepliński: judge [Julia Przyłębska](#). This can be seen as a direct attack against Vice President Stanisław Biernat who would otherwise be in charge in case of a vacancy at the helm of the Tribunal. The office of the Vice President, nota bene, is directly provided by the Constitution.

Earlier this week, the judges of the Tribunal have gathered to vote for candidates for President. According to the decision of November 7th, all candidates need a majority to make it on the list. Now, the three judges legally appointed by PiS (not to be confused with the three „anti-judges“) had suddenly and univocally declared to be befallen by a sudden illness. They didn't show up to the meeting, which thereby fell short of the required minimum of attending judges. The judges present voted anyway and proposed judges Marek Zubík, Piotr Tuleja and Stanisław Rymar as candidates for President Duda to choose from. It is thought highly unlikely, though, that he will accept this list.

The result is that on December 19th, when President Rzepliński steps down, there might be two persons who claim the interim authority to fill the vacancy – judge Julia Przyłębska in her new capacity as President-Commissioner and Vice-President Stanisław Biernat. Przyłębska would admit the three „anti-judges“ to the bench, so there would be seven PiS judges and eight anti-PiS judges. As it needs five judges to decide as panel, each camp could issue judgments, possibly contradicting one another.

This is the backdrop of the [stunning statement by four of the Tribunal's former Presidents](#), Marek Safjan, Jerzy Stępień, Bohdan Zdziennicki and Andrzej Zoll, which we published earlier this week on Verfassungsblog. If PiS has its way this might be very well the last public statements these highly respected lawyers (one of them the current Polish judge to the European Court of Justice) will be allowed to make – the draft law apparently includes some sort of gag order for retired judges of the Constitutional Tribunal.

## Private Schools, Italy, Free Trade, a Core European Citizenship

The EU with all its huffing and puffing about the rule of law and European values has been conspicuously absent from the debate in Poland lately, testament to the profound crisis of confidence the integration project is going through right now.

OLIVER GARNER has a suggestion to make: make [Union citizenship a matter of choice](#)! Let the individual decide whether or not he or she wants to be citizen of a united Europe, thereby building a Core Europe not of states but of people.

What freedom of movement and anti-discrimination regulations are for the Right, free-trade agreements are for the Left – a cue to rally against Europe. NILS WAHL, Advocate General at the European Court of Justice, and his référendaire LUCA PRETE call on the EU institutions to [cling to their commitment to free trade and to interpret the Treaties accordingly](#), unafraid of the allegation that this might be precisely what got the EU into its current predicament in the first place.

Tomorrow, the European political establishment might receive another punch when Italians cast ballot on the largest Constitutional reform in their recent history, or rather: whether or not they like and trust their Prime Minister. I have sent FRANCESCO CLEMENTI a number of questions about [what happens when YES or NO prevails](#) and, unlike some commentators, he doesn't see all that much reason for alarm after all.

MICHAEL WRASE points to a constitutional provision rarely noticed in Germany, but of potentially high importance and consequence: Private schools, to get a licence, need to make sure that they do not contribute to social segregation. Which they obviously, in many cases, do. This, according to Wrase, means that [private schools ought to be cut off public funding](#) (in German).

## Elsewhere

- JENS MILKER explains the legal situation of [„social bots“ as tools to influence electoral campaigns](#), and TOBIAS BRINGS-WIESEN replies (in German),
- JEAN PISANI-FERRY reminds us to the fact that the [Euro crisis has never been resolved](#) and might, in fact, be back with a vengeance soon,
- THOMAS FLEINER reports on the decision by the [Swiss sovereign not to exit nuclear energy](#),
- ALINA TRYFONIDOU complains about the [failed opportunity for the ECJ to protect same sex couples](#) in

*Parris v. Trinity College,*

- DANIEL GOVER and MICHAEL KENNY evaluate how the „ [English votes for English law](#)“ procedure in the Westminster Parliament is coming about,
- LORENZA VIOLINI and ANTONIA BARRAGA disentangle the different strands of the [Italian bicameralism reform](#) that will be confirmed or rejected in tomorrow's referendum,
- and for those who are not afraid to wade knee-deep into Italian constitutional politics ANDREA PAVONI and SIMONE TULUMELLO have some highly interesting insights to offer, including the conjecture that [Renzi's move to personalise the referendum might in fact not have been a mistake at all](#) but a rather clever strategy out of the „There Is No Alternative“ mold,
- THOMAS POOLE turns the table in the Brexit- and Article-50 fight and claims that executive „[prerogative is the enemy of the people](#)„,
- JILLIAN VENTURA offers a thorough analysis of the super-invasive [new surveillance legislation in the UK](#),
- HARISH NARASAPPA warns against [demonetization policies in India](#) as a token of weakening of the rule of law,

and here is a selection of this week's harvest of post-Trump constitutionalist fightback efforts in the US:

- SANDY LEVINSON lists some future no-no topoi like „Trump is a narcissist“ under the rule of a [new „political correctness“](#) which people post-Trump might have to subscribe to if they don't want to be shut out of public discourse,
- [ORIN KERR](#) and [LARRY LESSIG](#) continue their discussion on the Electoral College's obligation to elect or not elect Trump,
- EUGENE VOLOKH reassures flag-burners that they will not be, as announced by Trump, [deprived of their US citizenship](#), and so does [STEVE VLADECK](#).
- That libertarians and liberals align in opposition to what lies ahead under a Trump administration can be observed in the legal blogosphere with the conservative-leaning *Lawfare* editor BENJAMIN WITTES [defending „libertarian panic“](#) in the face of Trump and liberally inclined *Just Security* blogger BRETT MAX KAUFMAN, not without a whiff of sarcasm, welcoming „[new friends in new foxholes](#)„, and BOBBY CHESNEY [protesting against the allegation of a change](#) in *Lawfare*'s editorial stance (so the infighting might still go on for a while),
- FIONUALLA NÍ AOLÁIN has collected [reactions from NATO and European heads of state](#) to Trump's election and comes to the conclusion that these reactions bode ill for US security interests,
- GEOFFREY CORN draws a chilling picture of the [corrosive risks of a lawless leadership](#) for the US military,
- JOHN QUIGGIN sees a parallel between the Trump election and the [18th of Brumaire](#).

Next week, we will see a hugely important decision by the German Federal Constitutional Court about Angela Merkel's decision to shut down nuclear plants without reimbursing their owners. Tomorrow already, we will know if the far-right FPÖ party succeeds in taking the Federal Presidency in Austria. The UK Supreme Court will hold a hearing in the *Miller* case about whether or not the Parliament has a say about Brexit. And, of course, Italy... Another fateful week for constitutionalism in Europe and beyond, if you have the stomach for it or not.

All best, and take care,

Max Steinbeis

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